

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**REPLY COMMENTS OF
ACN COMMUNICATION SERVICES, INC.**

I. MANY COMMENTERS HAVE ESTABLISHED THAT THERE ARE ECONOMIC BARRIERS THAT IMPAIR THEIR ABILITY TO OFFER SERVICES IN CERTAIN MARKETS.

In the *Triennial Review Order*, the Commission refined its impairment standard, emphasizing that there are both operational and economic barriers that can impair a competitor's ability to provide service in a new market.¹ The *USTA II* court neither vacated nor remanded the *Triennial Review Order* standard, although it expressed skepticism regarding the Commission's ability to establish a standard of economic impairment in regard to mass market switching.²

In regard to mass market switching, the Commission determined that the hot cut process presented an operational barrier that created a rebuttable presumption that competitors were

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 para. 84 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003)(*Triennial Review Order*).

² *United States Telecom Association v. F.C.C.*, 359 F.3d 554, 572 (2004)(*USTA II*).

impaired on a nationwide basis without access to unbundled mass market switching.³ This finding, and with it any presumption that there are, or could be, operational barriers associated with switching, was vacated in *USTA II* because of inconsistencies in the Commission's overall evaluation of BOC hot cut processes.⁴

The submissions of a large number of commenters have, however, remedied the deficiencies in the Commission's TRO findings that were identified by the court in *USTA II*. These submissions have established that, notwithstanding skepticism reflected in *USTA II*, there are indeed *economic* barriers associated with mass market switching, and that the extent of these barriers can easily and reliably be ascertained. In its comments, ACN demonstrated that, with customers spread thinly among over 5,000 wire centers, it lacks the economies of scale to provision its own switching. In the current climate, ACN cannot go to the financial markets for the financing necessary to equip all of these central offices to serve a mere 175,000 lines (an average of 35 lines per wire center). However, without such ubiquitous coverage, ACN is at a disadvantage compared to the RBOCs. Almost all of these offices exist outside of the top 150 MSAs in which the BOCs claim that "over 10,000 CLEC switches" address, or they are grouped in the 17% of top 150 MSA wire centers that the BOCs admit have no facilities-based competitive presence at all.⁵ The *UNE Fact Report 2004* ignores the customers served by these wire centers, and so will any regulatory regime that does not permit unbundled switching in these

³ *Triennial Review Order* para. 468.

⁴ *USTA II*, 359 F.3d at 571.

⁵ Letter from Evan T. Leo, Kellogg Huber to Marlene H. Dortch, F.C.C., Attachment at II-43 (Oct. 4, 2004) ("UNE Fact Report 2004").

areas. And, according to the *UNE Fact Report 2004*, this could be as much as one third of the U.S. population.⁶

Other commenters, both with similar and dissimilar business plans, have established that they too are impaired in these situations:

CompTel/ASCENT – Determined that absolute cost disadvantages embody a high entry barrier in today’s challenging capital markets, and CLECs suffer a cost penalty because they cannot realize full economies of scale. Suggested a 1500 line per competitor per end office threshold.⁷

Dialog – Determined that residential rural markets are characterized by poor economies of scale and scope, as well as income constrained customers, making it more difficult for a facilities-based competitor to justify the investment in the residential market as compared to a competitor serving business customers or operating in an urban market.⁸ Suggested that requesting carriers are impaired without access to unbundled switching provided to residential customers in central offices with fewer than 25,000 residential DSOs where fewer than 8,000 residential DSOs are served by all competitors.⁹

Eschelon - Any CLEC hoping to capture multi-location customers must be able to offer service across the entire region, if it wants to be competitive with the ILEC. However, few if any CLECs have access to sufficient capital resources at this point to fund the expansion of their collocation footprints materially in advance of any actual revenue in that footprint. Customers with locations in non-located wire centers must be served using an off-net product for some extended period of time. Suggested a threshold of line equivalent of two DS3s (1,344 lines).¹⁰

Lightship and Nuvox – Joined in *ex parte* letter with Eschelon.

Michigan Based CLEC Coalition - Found it imperative that Commission establish definite, objective rules in order to rid the industry of uncertainty and to protect innovation by small to mid-sized carriers and businesses. Suggested a threshold of 10,000 combined residential and business voice-only competitor lines in any LATA.¹¹

⁶ *Id.* at II-42.

⁷ CompTel/ASCENT Comments at 45.

⁸ Dialog Comments at 4-5.

⁹ *Id.* at 12.

¹⁰ Lightship, Eschelon and Nuvox Letter to Marlene Dortch, Secretary, F.C.C. (Oct. 15, 2004).

¹¹ Michigan Based CLEC Coalition Comments at 5.

Telscape – Determined that lack of customer density or "critical mass" in a central office area frustrates entry and investment in facilities. Suggested impairment exists where one end point serves a central office with fewer than 25,000 business lines.¹²

Even the *UNE Fact Report 2004* acknowledges the difficult economies of serving the residential market, reporting that

[t]he principal explanation for why competing carriers have used their circuit switches to serve millions of small business customers, but few residential customers, is that the revenue opportunities of serving business customers are greater. Retail rates for small business customers exceed residential rates by an average of more than 85 percent, according to the Commission's own data. The cost-side of the equation, by contrast, is basically the same for residential and small business customers, as the Commission has found.¹³

Moreover, unlike some of the competitive carriers that the *UNE Fact Report 2004* cites,¹⁴ ACN *does* focus on individual wire centers, and must contend with the start-up inefficiencies inherent in such a strategy. If carriers like ACN were not willing to do so, many consumers would have no competitive choice at all.

The real-world experience of all of these carriers indicates that, below a certain threshold of lines terminating in a potential collocation site, it is uneconomic to enter the market with a self-provisioned switch. This is borne out by the simple fact that there is still no ubiquitous facilities-based carrier offering service to mass market customers.

II. CLECS HAVE NO ACCESS TO NECESSARY CAPITAL.

ACN agrees with commenters such as Dialog that the economic barriers to competitors are exacerbated by the reticence of the capital markets in the wake of signals from the

¹² Telscape Comments at 9-10.

¹³ *UNE Fact Report 2004* at II-42.

¹⁴ *Id.* at II-42 n.218.

Commission that it intends to impose further restrictions on unbundling. Thus, investment capital is only available from existing cash resources or operations – and few companies in the industry have those types of funds, other than the incumbents.

Moreover, even if capital were as readily available as it was in the late '90s, it would still be virtually impossible to for ACN to fund a plan that proposes to serve 175,000 lines spread among 5,000 end offices. In fact, this probably accounts for why the residential market has been, and remains, largely unserved by competitors. ACN submits that, without the foothold that unbundled switching permits, competition will remain long in coming to residential and non-urban customers.

III. CONCLUSION

ACN is clearly not alone in advocating continued access to unbundled switching for underserved markets. To reiterate ACN's recommendation from its Comments, the Commission should:

- 1) establish separate impairment tests for residential versus commercial lines, and
- 2) find that requesting carriers are impaired without access to mass market unbundled switching provided to residential customers in central offices with in which the requesting carrier serves fewer than 3,500 lines.

This recommendation conforms to the Commission's impairment standard because it recognizes legitimate barriers relates to economies of scale, sunk costs and the first mover advantages enjoyed by the incumbent.

Accordingly, the Commission should adopt the impairment determination described herein.

Respectfully submitted,

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